

ALL UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

ANTHONY GILLESPIE,  
v.  
Plaintiff,

9:09-CV-0295  
(DNH)(GHL)

LISA FRANK, Correctional Officer; DEMARCO, Correctional Sergeant; J. MOORE, Correctional Sgt.; MOORE, Civilian Cook Correctional Food Service; and PETER BRUYEORE, Civilian Cook , Correctional Food Services, All of Gouverneur Correctional Facility.

## Defendants.

## APPFARANCES

OF COUNSEL

ANTHONY GILLESPIE  
Plaintiff *pro se*  
99-A-5737  
Ulster Correctional Facility  
P.O. Box 800  
Berme Road  
Napanoch, NY 12458

HON. ANDREW M. CUOMO  
New York State Attorney General  
Attorney for Defendants  
The Capitol  
Albany, New York 12224

RICHARD LOMBARDO, Esq.  
Assistant Attorney General

DAVID N. HURD  
United States District Judge

## **DECISION AND ORDER**

Plaintiff Anthony Gillespie commenced this action *pro se*, and now requests that the action be voluntarily dismissed. Dkt. No. 22. Plaintiff indicates that he “is overload[ed] with other cases elsewhere and plaintiff could not prosecute an action or proceed[ ] diligently under Fed. R. Civ. P. 41.2(a).” *Id.* Plaintiff further states that he understands that the

"granting of the application shall in no way relieve [him] of the obligation to pay the full amount of the filing fee." *Id.* Defendants have appeared in this action by filing a motion to dismiss. Dkt. No. 16. Defendants indicate that they "consent to plaintiff's request . . . that this action be dismissed." Dkt. No. 23.

Having reviewed the matter, plaintiff's application is construed as seeking voluntary dismissal of this action pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Since defendants have neither answered nor moved for summary judgment, plaintiff is entitled to voluntary dismissal of the action, without further order of the court, upon the filing of such a notice. Fed. R. Civ. P. 41(a)(1)(A)(i).<sup>1</sup> And, by rule, in the event that plaintiff has not previously once dismissed an action based upon the same circumstances in this or any other court of competent jurisdiction, the dismissal is properly without prejudice unless the notice states otherwise.<sup>2</sup> *Id.*

In light of the foregoing, upon the filing of plaintiff's notice, this action was dismissed, without prejudice, and an order of the court was not required in order to implement that dismissal. Additionally, since this action is dismissed, defendants' motion to dismiss (Dkt. No. 16) is denied as moot.

THEREFORE, it is

---

<sup>1</sup> Fed. R. Civ. P. 41(a)(1)(A)(i) states that a plaintiff may voluntarily dismiss his action without a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."

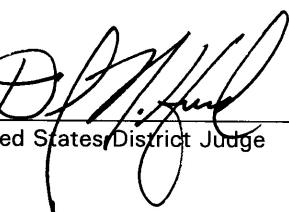
<sup>2</sup> A search of the Federal Judiciary's Public Access to Court Electronic Records Service (PACER) of "Gillespie, Anthony" yielded no other action filed in any Federal District Court by this plaintiff. See U.S. Party/Case Index (last visited Dec. 11, 2009) <<http://pacer.uscourts.gov/cgi-bin/dquery.pl>>.

ORDERED that

1. The Clerk of the Court close this case and reflect that the action is voluntarily dismissed without prejudice pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure;
2. Defendants' motion to dismiss (Dkt. No. 16) is **denied as moot**; and
3. The Clerk shall serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: December 15, 2009  
Utica, New York.



\_\_\_\_\_  
United States District Judge